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NO. 82-15

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

RAY E. OLIVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICUS CURIAE, THE STATE OF CALIFORNIA, IN SUPPORT OF RESPONDENT THE UNITED STATES OF AMERICA

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INTEREST OF AMICUS CURIAE

The State of California has an important interest in the outcome of this case.

The State of California is faced with the daily task of enforcing its criminal laws against individuals who cultivate large amounts of marijuana and conduct other illegal drug operations in

open fields. The State is seriously concerned that limitation of the open fields doctrine may restrict the ability of its law enforcement officers to ferret out these areas under cultivation and enforce its drug laws. The State is also charged with protecting its valuable natural resources such as its land and wildlife. Restriction of the open fields doctrine may limit the ability of agencies charged with protecting the State's resources from doing their jobs.

In addition, limitation of the open fields doctrine could lead to confusion among state officials regarding what lands are subject to a warrantless search. This could only serve to aggravate a recent trend in California where a significant proportion of felony cases have had to be rejected for prosecution due to search and seizure problems. Indeed, this problem was particularly pronounced in drug cases.

Maintenance of the open fields doctrine is of particular import to California at this time as lower California courts have been confused on this issue of federal law. Moreover, with the recent enactment of the Victim's Bill of Rights in California, California courts may no longer use independent state grounds to invalidate a search. Thus, this Court's interpretation of the open fields doctrine will have a direct impact on California courts, law enforcement and all the citizens of California. (Cal. Const., art. I, § 28(d).)

SUMMARY OF ARGUMENT

A. Katz v. United States (1967) 389 U.S. 347, does not affect the open field doctrine first enunciated by this Court in Hester v. United States (1924) 265 U.S. 57. The Katz decision never purported to overrule or limit the open

fields doctrine, but instead cited it with approval. Similarly, Justice Harlan's concurring opinion in Katz cites Hester with approval.

Furthermore, the Fourth Amendment itself and decisions of this Court in various cases such as Air Pollution Variance Bd. v. Western Alfalfa (1974) 416 U.S. 862, show the Katz decision did not invalidate or modify the open fields doctrine first enunciated in Hester. Indeed, other federal and state courts have reached the same conclusion. Support for this position may also be found in the fact this Court and other courts have continued to consider the type of property involved in deciding whether a warrantless search is appropriate. Thus, Katz did not preclude consideration of the type of property involved in the search in determining whether a warrant is required.

Policy considerations such as the need to not unnecessarily limit state officers searching for contraband and public resource violations as well as the need for predicability in search and seizure law also weigh in favor of keeping the open fields doctrine in its present form.

B. Even assuming arguendo that the Katz decision applies to open fields, it does not overrule the open fields doctrine. Rather the open fields doctrine still has independent meaning as it indicates open fields are not areas in which one can reasonably expect to have a right to privacy.

C. Application of the Katz standard to open fields does not let the owner determine for himself whether he has an expectation of privacy as petitioner suggests. Rather, it must also be determined whether the expectation of privacy

is one that society is prepared to recognize as reasonable.

ARGUMENT

I

KATZ V. UNITED STATES DOES NOT AFFECT THE OPEN FIELDS DOCTRINE FIRST ENUNCIATED BY THIS COURT IN HESTER V. UNITED STATES

The fundamental issue presented in this case is what is the scope of the open fields doctrine first enunciated by this Court in Hester v. United States (1924) 265 U.S. 57. It is the position of amicus curiae, the State of California, that the Katz decision was not intended to affect the open fields doctrine. Consequently, that doctrine has the same vitality today that it had when first espoused in Hester back in 1924.

In Hester v. United States, supra, a revenue agent watched the home of Hester's father and, from a distance of 50

to 100 yards, saw Hester hand a bottle to a person who was believed to be a customer of bootleg whiskey. The agents were observed, Hester went to his car and removed the jug from it. He then ran through the fields. Both the bottle carried by the customer and the jug carried by Hester were thrown into an open field. The agents later examined the bottles.

In a unanimous opinion it was held there had been no illegal search although the officers had technically trespassed on the property. This Court also concluded the special protection given by the Fourth Amendment to persons, houses, papers and effects is not given to open fields. This Court also noted the distinction between open fields and a house is as old as the common law.

The Hester rule was applied over the years to nearly any lands which did

not fall within the curtilage. In Care v. United States (10th Cir. 1956) 231 F.2d 22, the rule was applied to a cave about 125 yards of a house. The cave was found to be in the open fields because it was not located in the curtilage. The open fields doctrine has also been applied to police entry into wooded areas, desert, vacant lots in urban areas, open beaches, reservoirs and open waters. (See LaFave, Search and Seizure, ch. 2, § 2.4, p. 332; Ringel, Searches and Seizures, § 8.4, p. 8-27.)

In Katz v. United States (1967) 389 U.S. 347, this Court first stated the concept that the Fourth Amendment protects people and not places. In addition, there was discussion of the fact the Fourth Amendment issues dealt primarily with the question of a reasonable expectation of privacy. From this language, courts have reached conflicting

conclusions as to the continuing viability of the open fields doctrine.

Some courts have taken the position that Katz sounded the death knell of the open fields doctrine and had actually overruled Hester. Other courts took the position that the open fields doctrine had not been affected at all by Katz. A third theory was that a per se theory of an open field exception to the Fourth Amendment had been undermined by Katz. However, the open fields doctrine is still a useful tool for deciding that, under Katz, one cannot have a reasonable expectation of privacy in open fields. (State v. Cemper (Neb. 1981) 307 N.W.2d 820, 822; Goehring v. State (Tex. 1982) 627 S.W.2d 159.)

As noted earlier, it is the position of the State of California that Katz did not have any impact on the scope

and viability of the open fields doctrine first enunciated in Hester.

In Katz v. United States, supra, 389 U.S. 347, this Court concluded eavesdropping by the government agents on the defendant's phone conversation in a phone booth violated the defendant's rights under the Fourth Amendment. In reaching this conclusion Justice Stewart stated the now famous and oft quoted phrase that, ". . . the Fourth Amendment protects people, not places" and also indicated the question to be considered was the person's expectation of privacy. (Id., at pp. 351, 353.)

A careful glance at the Katz decision indicates it really did not have any impact on the rule relating to open fields. First, the Katz decision had nothing to do with open fields. Instead, it dealt with an enclosed phone booth. Moreover, much of the decision seemed to focus on the inherent problems and dangers

involved in government wiretapping and/or eavesdropping. This area has always been of special concern to this Court, Congress and the states, and has been given special treatment over the years. (See, e.g., Cal. Pen. Code, § 630 et seq. relating to wiretapping and eavesdropping; see too Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520.)

Moreover, a footnote in the majority opinion indicates that the parties agreed an open field is not one of the areas protected by the Fourth Amendment and then cites Hester v. United States. (Katz v. United States, supra, 389 U.S. at p. 351, fn. 8.) This hardly indicates Katz was designed to limit the application of Hester.

Similarly, Justice Harlan in his concurring opinion indicated Katz had nothing to do with open fields and repeated the fundamental distinction between areas

protected by the Fourth Amendment and open fields.

> "I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, Weeks v. United States, 232 U.S. 383, and unlike a field, Hester v. United States, 265 U.S. 57, a person has a constitutionally protected reasonable expectation of privacy; . . ." (Katz v. United States, supra, 389 U.S. at p. 360 (conc. opn. of Harlan, J.).)

In addition, later in his opinion he observed that conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable citing Hester v. United States. (Katz v. United States, supra, at p. 361.)

Thus it is far from clear, as petitioner would suggest (see AOB 19), that Katz overruled or limited the open

fields doctrine. Indeed, it appears that Katz reaffirmed the proposition that open fields differ from other areas and are not subject to Fourth Amendment protection.[1/]

Moreover, the language of the Fourth Amendment itself points to the conclusion Katz was not designed to limit the open fields doctrine. The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated . . . ." While the amendment specifically protects persons, houses and possessions of persons, it does not specifically state there is any protection for open fields.

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1. The Wisconsin Supreme Court has even suggested Katz was designed to limit the right of privacy of individuals in areas already protected by the Fourth Amendment such as the house and curtilage area. (Conrad v. State (Wisc. 1974) 218 N.W.2d 252, 258.)

Furthermore, one cannot help but notice that for a doctrine petitioner would contend was overruled by Katz, the open fields doctrine and the Hester decision have been repeatedly cited and relied on by this Court.

In Bivins v. Six Unknown Fed. Narcotics Agents (1971) 403 U.S. 388, 393, this Court cited Hester and the open fields doctrine as an example of where there was no violation of Fourth Amendment rights although local law may have been violated. (Id., at p. 393, fn. 6.)

The open fields doctrine and Hester were again cited in Cady v. Dombrowski (1973) 413 U.S. 433, 449-450, where this Court observed it did not have to consider whether the search of the back seat of a car located in an open field required a warrant in light of Hester v. United States.

Moreover, the open fields doctrine was heavily emphasized by this Court in Air Pollution Variance Bd. v. Western Alfalfa, supra, 416 U.S. 862. There a state health inspector entered the yard of the alfalfa company without its knowledge and consent and without a warrant to make an air pollution test on the smoke being emitted from the company's plant. This Court found no violation of any Fourth Amendment rights was involved in the conduct of the inspector. Indeed, relying heavily on Hester, it was noted the Fourth Amendment did not apply to open fields such as involved there where the inspector did not enter the buildings of the company, but observed what anyone near the plant could see in the sky. Indeed, without citing the Katz decision at all this Court observed that the inspector was ". . . well within the 'open fields' exception to the Fourth

Amendment approved in Hester." (Air Pollution Variance Bd. v. Western Alfalfa, supra, 416 U.S. at p. 865, emphasis added.)

Hester and the open fields concept have also been cited with approval in decisions of this Court in United States v. Santana (1976) 427 U.S. 38, 42 and G. M. Leasing Corp. v. United States (1977) 429 U.S. 338, 351, as well as Rakas v. Illinois (1978) 439 U.S. 128, 143-144, fn. 12. The open fields doctrine thus has had a rather lively history for a "dead" doctrine.

Indeed, the Hester decision was cited just this term in United States v. Knotts (Mar. 2, 1983) ___ U.S. ___ (51 U.S.L.Week 4232; but see conc. opn. of Blackmun, J.). In Knotts a beeper was placed in a five gallon drum containing chloroform purchased by one of the codefendants. By monitoring the progress of a car carrying the chloroform, agents were able to trace the can from its place

of purchase to its destination. This Court concluded use of the beeper did not constitute a search or a seizure and validated use of the beeper.

In reaching this conclusion this Court relied on the Katz doctrine of expectation of privacy. However, this Court also impliedly noted that there was no Fourth Amendment protection for open fields.

> "But no such expectation of privacy extended to the visual observation of Petschen's automobile arriving on his premises after leaving a public highway, nor to movements of objects such as the drum of chloroform outside the cabin in the 'open field.' Hester v. United States, 265 U.S. 57 (1924)." (United States v. Knotts, supra, 51 U.S.L.Week at p. 4234.)

Consequently, a reading of the prior decisions of this Court leads to the unmistakable conclusion that the Katz doctrine has not had any impact on

the viability of the open fields doctrine. Rather that doctrine is as viable and strong as when it was first enunciated in Hester.

While it is true that cases can be cited for the proposition that Katz has limited Hester (see, e.g., State v. White (Ariz. 1977) 574 P.2d 840, 847 and cases cited therein), a substantial number of federal and state cases do support the proposition that the Hester decision and the open fields doctrine have not been limited by the Katz decision. (State v. Dow (Me. 1978) 392 A.2d 532; State v. Osborn (Ohio 1980) 409 N.E.2d 1077; Casey v. State (Nev. 1971) 488 P.2d 546; State v. Charvat (Mont. 1978) 573 P.2d 660, 661; Commonwealth v. Janek (Pa. Super. 1976) 363 A.2d 1299; United States v. Cobler (W.D. Va. 1982) 533 F.Supp. 407, 411; United States v. Ramapuram (4th Cir.

1980) 632 F.2d 1149, 1155; United States ex rel. Saiken v. Bensinger (7th Cir. 1976) 546 F.2d 1292; United States v. Basile (9th Cir. 1978) 569 F.2d 1053, 1056.)

Moreover, while some lower California courts have concluded the California Supreme Court has embraced the Katz rule and thereby diluted the open fields doctrine (see, e.g., Soli v. Superior Court (1980) 103 Cal.App.3d 72, 79-81), it appears that in its most recent pronouncement on the subject the California Supreme Court has treated open fields as a separate area in which there is no Fourth Amendment protection.

In People v. Dumas (1973) 9 Cal.3d 871, 882, the court was discussing certain places which may be searched without a warrant even when there is no emergency present. In a footnote to this discussion it was observed that:

> "This category includes places that may be classified as 'open fields' (Hester v. United States (1924) 265 U.S. 57, 58-59), and places in which a defendant has not exhibited a subjective expectation of privacy or where such an expectation would be unreasonable (People v. Bradley (1969) 1 Cal.3d 80, 85). [Citation.]" (People v. Dumas, supra, 9 Cal.3d at pp. 882-883, fn. 10, emphasis added.)

It is of particular interest to note the court treats open fields separately from areas in which an individual might have an expectation of privacy. This separation of open fields from the general rules on expectation of privacy certainly suggests the California Supreme Court concluded the open field doctrine stands apart from Katz and still stands for the clear proposition that the Fourth Amendment simply does not apply to open fields.

Thus, federal courts and state courts have also reached the conclusion

that Katz has not limited the scope and viability of the open fields doctrine.

It must also be observed that those commentators and courts who have been unable to reconcile Katz and Hester have placed great emphasis on the language in Katz that the Fourth Amendment protects persons and not places. However, this language in Katz did not end consideration of the fact that different places receive different levels of Fourth Amendment protection. Consequently, there is no reason why the Katz decision precludes a finding that open fields are exempted from Fourth Amendment protection.

Indeed, as observed earlier, Justice Harlan noted that the place of the search was still paramount in order to determine what protection is afforded to persons. (Katz v. United States, supra, 389 U.S. at p. 361 (conc. opn. of Harlan, J.); see too Rakas v. Illinois, supra, 439 U.S. at pp. 143-144, fn. 12.)

In accord with this concept, special recognition has been given to searches at the border. (See United States v. Ramsey (1977) 431 U.S. 606, 619-622.) Similarly, vehicles have been given a different level of protection than homes or offices. (South Dakota v. Opperman (1976) 428 U.S. 364.) Likewise, it has been noted there is no right to privacy in jails. (Lanza v. New York (1962) 370 U.S. 139.) See People v. Dumas, supra, 9 Cal.3d at pages 881-885 for an extensive discussion on this topic. "The pattern of prior decisions suggests that one of the most crucial determinants of the validity of warrantless searches is the nature of the place subjected to search." (Id., at p. 881.)

Accordingly, the Katz decision does not require that the open fields doctrine be abandoned. Instead, Katz and Hester can be reconciled by concluding

Katz discusses expectation of privacy in areas protected by the Fourth Amendment while this Court has concluded there is no Fourth Amendment protection at all where open fields are involved.

Several policy considerations also point to the need for maintaining the open fields doctrine in its present form.

First, one of the major concerns in California as in other states involves detection of large fields of marijuana. In order to detect these marijuana fields which are often in remote areas, airplane overflights have been employed. If the open fields doctrine were applied in its present form, there would certainly be no problem with flying over these open fields to look for marijuana. However, if Katz were applied, questions as to whether there is an expectation of privacy in certain airspace could become troublesome.

In California, for example, some of the lower courts have applied Katz to open fields searches despite the language in People v. Dumas quoted earlier. Consequently, some confusing results have obtained.

In People v. Sneed (1973) 32 Cal.App.3d 535, the court found a landowner had a right to privacy with regard to flights over his open fields when the flights were too close to the ground. However, in a later case it was held a landowner under similar circumstances had no right to privacy with regard to overflights at an altitude of 300 feet or more. (Dean v. Superior Court (1973) 35 Cal.App.3d 112.)

Thus, depending on the facts, it is arguable there is no right to privacy in an open field after Katz in California, a right to privacy in the airspace over that field up to 300 feet and no right to

privacy above that altitude. Such a result makes no sense and only serves to artificially limit law enforcement investigation.

It is of interest to note the dissent below indicates while Mr. Oliver had an expectation of privacy with regard to persons entering his property here, he had no expectation of privacy with regard to overflights. (United States v. Oliver (6th Cir. 1982) 686 F.2d 356, 372.) The varying views of these cases as to the right to privacy with regard to persons actually on the land and overflights also points up the confusion that can be generated if Katz is applied to open fields. By contrast, if Hester applied here, the fields 1.4 miles from the house and subject to overflights would clearly be open fields. (Id., at p. 362.)

Moreover, if Katz were applied to a place which heretofor has not received any Fourth Amendment protection,

it could result in application of Katz to other places which have generally not been subject to an ad hoc balancing test as to the privacy interest in each case. These areas include borders and moving vehicles.

It must also be noted that California, like many other states, has vast plant and animal resources which it must protect. These natural resources are protected in part by the ability of state Fish and Game and Forestry officers to enter private lands for inspection purposes without a warrant. (See, e.g., Cal. Fish & Game Code, §§ 1006, 7702; Cal. Pub. Resources Code, § 4119.) While these entries may be justified in part as administrative searches, the right to conduct these searches without a warrant rests in part on the fact open fields and areas are being inspected. Thus, restriction of the open fields doctrine

may seriously hamper the ability of these officers to inspect open lands for resource violations without a warrant. Moreover, the warrant requirement would make such inspections almost impossible as many of the areas to be inspected are in remote and/or rugged regions. By the time a warrant would be obtained hours or days later the cost in time and man hours could be prohibitive and the resources in question could be severely damaged or destroyed in the interim. (See, e.g., State v. Dow, supra, 392 A.2d 532.)

Furthermore, this Court has recently expressed a concern over the need to give law enforcement officers some ability to predict what searches will be upheld instead of having to make a guess on a case by case basis. (See, e.g., New York v. Belton (1981) 453 U.S. 454, 457-460; United States v. Ross (1982) ___ U.S. ___ (72 L.Ed.2d 572).) This same concern should apply to open fields.

While officers under Hester have to determine in each case whether a field is truly an open field, with some predicability they can determine whether the area searched is near a house or protected area or is an open field. This is certainly easier than having to predict whether a court at some later point will conclude under Katz that the owner did or did not have a subjective expectation of privacy which society objectively is willing to determine is reasonable as required by Katz.

Applying Katz to open fields also could open a whole myriad of problems with regard to whether an officer may look under a bush in a given field, dig a small hole, look under a rock or in the tall grass. It is possible that different expectations of privacy conceivably could attach to these different areas.

Thus, it seems more practical and realistic to apply the open fields doctrine espoused in Hester to open lands. This is particularly true when it is considered that an evaluation as to whether the field is truly an open field will in most cases protect the same interests of society and the individual that Katz would protect, but with much less confusion.

Thus, leaving Katz out of the open fields analysis will continue to allow officers to make objective determinations with some predicability as to whether a search is or is not proper. However, application of Katz to this area will only create the confusion this Court sought to avoid in the Belton and Ross decisions. Thus, sound social and policy interests also weigh against application of Katz to open fields.

Application of the "open fields doctrine" to this case clearly mandates the

finding the warrantless search here was proper under the open fields doctrine since, as the Sixth Circuit concluded, the land was clearly beyond the curtilage area. (United States v. Oliver, supra, 686 F.2d at p. 360.)

II

EVEN ASSUMING FOR THE SAKE OF ARGUMENT THAT UNITED STATES V. KATZ APPLIES TO OPEN FIELDS, IT DOES NOT OVERRULE THE OPEN FIELDS DOCTRINE

There is a suggestion in petitioner's brief that not only does the Katz decision apply to open fields, but it actually overrules the entire open fields doctrine.

However, there is little if any support for this position. Rather, if it is assumed for the sake of argument that the Katz decision does apply to open field cases, it is clear the open fields doctrine still has not been overruled.

First, as noted previously, numerous cases of this Court have continued to cite the Hester decision in cases where Katz was also cited and in cases where Katz did not apply at all. (See Air Pollution Variance Bd. v. Western Alfalfa Corp., supra, 416 U.S. 861; Rakas v. Illinois, supra, 439 U.S. at p. 144, fn. 12; G.M. Leasing Corp. v. United States, supra, 429 U.S. at p. 352; United States v. Santana, supra, 427 U.S. at p. 42; Cady v. Dombrowski, supra, 413 U.S. at p. 450; Bivens v. Six Unknown Fed. Narcotics Agents, supra, 403 U.S. at p. 393, n. 6.)

Second, this Court in Katz as well as later cases has continued to recognize the nature of the property involved has a definite impact on the expectation of privacy. (See Rakas v. Illinois, supra; South Dakota v. Opperman, supra, 428 U.S. 364; United States v. Santana, supra.)

Indeed, in United States v. Knotts, supra, 51 U.S.L.Week 4232, this Court applied the Hester case and the open fields doctrine in determining under the Katz rationale whether there was a subjective expectation of privacy which was objectively reasonable.

Accordingly, since the property interest involved has a bearing on the balancing process required under Katz, there is ample reason and authority for using the Hester doctrine to determine whether the property interest in which a right to privacy is claimed is or is not an open field.

> "Ownership and possessory rights in 'places' are still important in determining whether or not a particular person has a legitimate expectation of privacy in a particular place." (State v. Cemper, supra, 307 N.W.2d at p. 823.)

As was noted in Soli v. Superior Court, supra, 103 Cal.App.3d

at page 79: "'It now appears that Hester no longer has any independent meaning but merely indicates that open fields are not areas in which one traditionally might reasonably expect privacy.'" (Quoting from United States v. Freie (9th Cir. 1976) 545 F.2d 1217, 1223; United States v. Ramspuram, supra, 632 F.2d at p. 1155.)

A good example of this form of analysis can be found in United States v. Basile, supra, 569 F.2d 1053. There the court applied Katz to open fields. However, the court cited the Hester decision and concluded there was no expectation of privacy in a truck parked 100 yards from the house in question. This is a classic example of the logic employed by some courts in the open fields cases. (See United States v. Baldwin (5th Cir. 1982) 691 F.2d 718, 721-723; United States v. Williams (5th Cir. 1978) 581 F.2d 451.)

Accordingly, there is no merit to the suggestion in petitioner's brief that Hester has been totally overruled by Katz. Instead, it is apparent that at the very least Hester and the open fields doctrine provide a handy way of determining whether society wishes to respect the subjective expectation of privacy in the property owner. Moreover, this Court's holding in Hester, in light of Katz, is essentially that society does not recognize as reasonable an expectation of privacy in open fields. Nothing in the Katz decision compels a contrary conclusion.[2/] (See United States v. Williams, supra, 581 F.2d 451; United States v. Baldwin, supra, 691 F.2d 718.)

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2. Petitioner makes much of the fact the field in question here was fenced. However, numerous decisions have concluded the open fields doctrine is not restricted to fields that are unfenced and unposted. (See, e.g., United States ex rel. Saiken v. Bensinger, supra, 546 F.2d 1292; State v. Cemper, supra, 307 N.W.2d at p. 823; Casey v. State, supra, 488 P.2d 546.)

Accordingly, as the marijuana found here was in a true open field (United States v. Oliver, supra, 686 F.2d at p. 360), and was situated in such a way that petitioner had no right to privacy in the airspace over the marijuana according to the dissent below (id., at p. 372); petitioner clearly had no right to privacy in the marijuana under the Hester-Katz analysis of the warrantless search conducted here. Thus, even if Katz and Hester are applied together to this case, the warrantless search still was proper here.

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2. (Continued)

Similarly, despite various statements to the contrary in petitioner's brief, the fact officers may have trespassed on the property does not invalidate the search under an open fields and/or Katz analysis. (Hester v. United States, supra, 265 U.S. 57; United States v. Jackson (4th Cir. 1978) 585 F.2d 653, 659; Air Pollution Variance Bd. v. Western Alfalfa, supra, 416 U.S. 861; People v. Krivda (1971) 5 Cal.3d 357; Katz v. United States, supra, 389 U.S. 347.)

III

APPLICATION OF THE KATZ STANDARD TO OPEN FIELDS DOES NOT LET THE OWNER DETERMINE FOR HIMSELF WHETHER HE HAS AN EXPECTATION OF PRIVACY IN THE FIELDS

Much of petitioner's brief seems to rest on the implied assumption that if Katz applies to fields such as the one in question here, the owner can determine for himself whether there is an expectation of privacy in the area to be searched. This is simply not true.

In United States v. Knotts, supra, 51 U.S.L.Week 4232, this Court noted the Katz test embraces two discrete questions. The first is whether the individual, by his conduct, has exhibited an actual (subjective) expectation of privacy. This involves a question of whether the individual has shown that he seeks to preserve something as private. The second question is whether the

individual's subjective expectation of privacy is one that society is prepared to recognize as reasonable.

Thus, a court must not only consider the intent and conduct of the owner of property, but the objective standards for the community in determining whether a right to privacy exists. Accordingly, the mere fact petitioner or a marijuana grower or drug importer posts a fence or a sign or may feel the area is secluded does not in and of itself given him an expectation of privacy. Society must also recognize his right to privacy. (See, e.g., State v. Cemper, supra, 307 N.W.2d at p. 823; Dean v. Superior Court, supra, 35 Cal.App.3d at p. 118, fn. 1.)

Consequently, we would respectfully suggest petitioner should not be permitted to dilute the objective standard of reasonableness imposed by Katz.

Furthermore, application of Katz and Hester here, as noted earlier, still indicate the warrantless search conducted here was proper.

CONCLUSION

Accordingly, amicus curiae, the State of California, respectfully requests this Court affirm the order of the United States Court of Appeals for the Sixth Circuit which had reversed the district court's order that the evidence seized in this case had to be suppressed.

Respectfully submitted,

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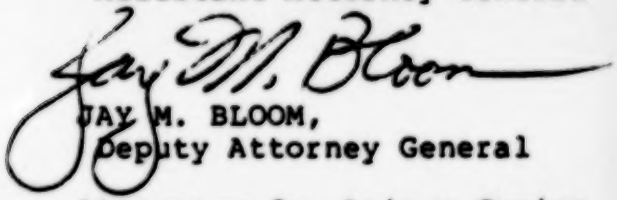

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NO. 82-15

RAY E. OLIVER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which County the within mentioned mailing occurred, and not a party to the subject cause. My business address is 110 West A Street, Suite 700, San Diego, California 92101.

I served the within BRIEF OF AMICUS CURIAE, THE STATE OF CALIFORNIA, IN SUPPORT OF RESPONDENT THE UNITED STATES OF AMERICA: An original and 39 copies on the United States Supreme Court as follows: Michael Rodak, Jr., Clerk, U.S. Supreme Court, Washington, D.C. 20543, of which a true and correct copy of the document filed in the cause is affixed, by placing three copies thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Rex E. Lee
Solicitor General of
the United States
Department of Justice
Washington, D.C. 20530

Frank E. Haddad, Jr.
Attorney at Law
529 Kentucky Home Life Bldg.
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Each envelope was then sealed and, with the postage prepaid, deposited in the United States Mail at San Diego, California, on the 31 day of March, 1983.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California March 31, 1983.

Clifford E. Reed

CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 31ST day of MARCH,
1983.

Notary Public in and for Said County
and State

KAREN K. [illegible]
NOTARY PUBLIC -- CALIFORNIA
COUNTY OF SAN DIEGO
My Commission Expires [illegible]

AFFIDAVIT OF SERVICE BY MAIL